Citation: 1229081 B.C. Ltd. (Re)
2023 BCEST 39

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

1229081 B.C. Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2023/035

DATE OF DECISION: June 13, 2023

DECISION

SUBMISSIONS

Laine Cooper on behalf of 1229081 B.C. Ltd.

OVERVIEW

1. This is an appeal by 1229081 B.C. Ltd. carrying on business as Hidden Gem Lash and Brow Studio and/or Hidden Gem Medi Spa, formerly known as Laine Marie Cooper carrying on business as Hidden Gem Lash and Brow Studio and/or Hidden Gem Salon & Spa (the "Employer") of a decision of a delegate of the Director of Employment Standards (the "Director") made March 7, 2023 (the "Determination").

2. Natasha Parker, a former employee of the Employer (the "Employee"), filed a complaint with the Director alleging that the Employer had contravened the *Employment Standards Act ("ESA")* by making unauthorized deductions from her wages.

3. A delegate of the Director (the "Investigating delegate") investigated the Employee's allegations and on October 18, 2022, issued an Investigative report (the "Report"). The Report was sent to the Employee and the Employer, who were asked to indicate if it contained any errors or required any clarification. Neither party provided a response to the Report.

4. A second delegate (the "Adjudicative delegate") reviewed the Report before issuing the Determination.

5. The Adjudicative delegate found that the Employer had made unauthorized deductions from the Employee's wages in contravention of section 21 of the *ESA* and determined that the Employee was entitled to recover wages in the amount of $4,982.32. The Adjudicative delegate further found that the Employee was entitled to accrued vacation pay in the amount of $199.29 on those wages pursuant to section 58 of the *ESA*, plus accrued interest in the amount of $446.80, for a total of $5,628.41.

6. The Director imposed two $500 administrative penalties for the contraventions, for a total amount payable of $6,628.41.

7. The Employer appeals the Determination on the grounds that the Director failed to observe the principles of justice in making the Determination. The Employer also contends that evidence has become available that was not available at the time the Determination was being made.

8. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I found it unnecessary to seek submissions from the Director or the Employee.

9. This decision is based on the *ESA* section 112(5) record that was before the Adjudicative delegate at the time the Determination was made, Ms. Cooper's submissions and the Reasons for the Determination.

ISSUE

10. Whether the Employer has established grounds for interfering with the Director's decision.

BACKGROUND AND ARGUMENT

11. 1229081 B.C. Ltd. was incorporated on November 1, 2019. Ms. Cooper is the sole director. Hidden Gem Lash and Brow Studio is a sole proprietorship registered in British Columbia on November 25, 2016. Ms. Cooper is the sole proprietor. Hidden Gem Medi Spa is an unregistered proprietorship operated by Ms. Cooper, and Hidden Gem Salon & Spa is also an unregistered proprietorship formerly operated by Ms. Cooper. The Employer operated the business as a sole proprietorship until January 2020, after which it began operating the business as 1229081 B.C. Ltd. carrying on business as Hidden Gem Lash and Brow Studio and/or Hidden Gem Medi Spa.

12. The Employer operated a hair salon and spa. The Employee was hired on September 1, 2017 as a senior hairstylist and she continued to work for the numbered company after January 2020 without any changes to the conditions of her employment.

13. The Employee received a 52% commission on her services and a 10% commission on product sales.

14. A public health emergency was declared in British Columbia on March 17, 2020, and on March 21, 2020, all personal service establishments such as day spas and hair and beauty salons were ordered to close. The Employer asserted, and the Director found, that the Employee's last day of work was March 17, 2020. The Employee resigned on May 27, 2020, before she was to be recalled to work.

15. The Director determined that the Employee's employment was continuous from September 1, 2017 until May 27, 2020.

16. The Employee alleged that the Employer improperly deducted the cost of hair products used by the business ("backbar fees") from the commissions she earned for performing services such as haircuts and colouring.

17. The Employer denied that deductions were made from the commissions, saying that commissions were calculated on a net amount (the cost of the service less the backbar fee) in accordance with the employment agreement. Ms. Cooper asserted that backbar fees were charged directly to the clients and not withheld from the Employee's commission pay. As an example, Ms. Cooper stated, if a woman's cut was $25, this cost included a $1 backbar fee and the Employee was paid a 52% commission on $24.

18. Although the Employer was unable to locate the original signed employment agreement, she submitted an agreement for another employee she asserted was similar with the exception that the Employer's name had been changed. Under 'Employee Compensation' was a handwritten notation as follows:

> $15/hr OR 48% commission on services provided. - $10/BB fee/colour exc. Anything under $35.00 + $1/cut exc. mens + kids."

19. Ms. Cooper explained to the Investigative delegate that this notation indicated a $10 backbar fee for colour services excluding services under $35 and a $1 backbar fee for haircuts excluding men's and

children's haircuts. The Employee did not recall having any handwritten compensation terms in her employment agreement.

20. The Adjudicative delegate found that the parties agreed the Employee would receive a 52% commission on services plus a commission on the sale of products. The Adjudicative delegate further found that the agreement provided for a deduction of a $10 backbar fee for colour services and a $1 backbar fee for haircuts. Based on the service records provided, the Adjudicative delegate determined that there was no deduction for children and men's haircuts.

21. The Adjudicative delegate considered the conflicting evidence of the parties about whether the backbar fees were to be deducted from the Employee's commissions or from the amount of the service before the calculation of the Employee's commissions. The Adjudicative delegate preferred the evidence of the Employee because, in her view, the payroll records corroborated her allegation that the Employer deducted the backbar fees from her commissions.

22. The Adjudicative delegate considered the Employee's original service reports from March to May 2019, July to November 2019 and January to February 2020 and found as follows:

> The original service reports include Ms. Cooper's handwritten calculations of the backbar fees which were then deducted from the [Employee's] base earnings at the end of the report. The handwritten amount at the end of the report corresponds with the amount paid to the [Employee] according to her wage statements. In essence, the original service reports *do not* corroborate Ms. Cooper's explanation regarding how she calculated the [Employee's] commissions. The service reports include a column showing the amount charged for a service (the Revenue Amount). The next column is the "Earnings" column (or the commission amount) which equals 52% of the Revenue Amount. This shows that the [Employee's] commission earned on a service was not calculated after the deduction of the back bar fee as the Employer claimed. Instead, the commission paid to the [Employee] (as calculated on the service reports by the Employer), was the 52% commission amount earned by the [Employee] for the service less from which the backbar fees were then deducted. (Determination, p. R6) [reproduced as written]

23. The Adjudicative delegate considered section 4 of the *ESA*, which provides that an agreement to waive a requirement of the *ESA* is of no effect and concluded that the backbar fees represented a business expense that was deducted from the Employee's wages in contravention of section 21 of the *ESA*.

24. The Adjudicative delegate found the Employer's service reports to be a reliable representation of the Employee's commission wages but for the months of June 2019, December 2019, February 2020 and March 2020, which were either incomplete or missing. For those months, the Adjudicative delegate accepted the accuracy of the Employee's records, as they were maintained contemporaneously and closely approximated those of the Employer for the remaining months. The Adjudicative delegate determined that the Employee was entitled to recover $4,982.32 in unauthorized deductions, plus $199.29 in accrued vacation pay on those wages.

Argument

25. The Employer alleges that the Determination contains "multiple errors and false allegations."

26. Ms. Cooper asserts that she and the Employee had both a verbal agreement in addition to the written agreement, and that the agreement provided for a backbar fee of $10 for colours and $1 for cuts. I note that this is what the Adjudicative delegate found to be the agreement between the parties.

27. The Employer argues that the backbar fees were deducted after the Employee's commissions were calculated. She says that she did not realize that calculating the commission then deducting the colour and cut fees would make a difference to the Employee's pay. She submits that if she simply made an accounting error in her calculations, that error was not "an illegal act" and that she should not be penalized with the imposition of an administrative penalty.

28. Ms. Cooper further says that the Employee never raised any concerns about her wages during the term of her employment.

29. Finally, Ms. Cooper alleges that the Employee's complaint was not filed within the statutory time period, or within the six months following the end of her employment.

ANALYSIS

30. Section 114 of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:

(a) the appeal is not within the jurisdiction of the tribunal;

(b) the appeal was not filed within the applicable time limit;

(c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;

(d) the appeal was made in bad faith or filed for an improper purpose or motive;

(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect that the appeal will succeed;

(g) the substance of the appeal has been appropriately dealt with in another proceeding;

(h) one or more of the requirements of section 112 (2) have not been met.

31. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law;

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was being made.

32. The Employer's submissions do not specifically address the grounds of appeal. However, because this process is designed for the participation of parties who are not legally represented, the Tribunal takes a large and liberal interpretation of the grounds of appeal. (see, for example, *Triple S Transmission*, (BC EST #D141/03)). I have, therefore, considered the Employer's submissions under each ground of appeal.

33. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the determination. An appeal is an error correction process, not an opportunity to re-argue a case that has been presented to the Director. I am not persuaded that the Employer has met the burden in this case.

Failure to Comply with Principles of Natural Justice

34. Natural justice is a procedural right that includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker.

35. There is nothing in the appeal submission that establishes that the Director failed to provide the Employer with an opportunity to know the allegations made by the Employee, or to respond to them. The record discloses that the Investigative delegate communicated with Ms. Cooper on several occasions during the investigation and provided her with the Report. The Employer was expressly asked to carefully review the Report and note any errors or clarifications. She did not do so. The Adjudicative delegate was therefore entitled to assume that the evidence and submissions of the parties was accurately reflected in the Report and based the Determination on the information set out in it.

36. I am not persuaded that the Director failed to comply with the principles of natural justice.

New Evidence

37. Attached to the appeal submission were pay records with Ms. Cooper's handwritten notations explaining how she calculated the Employee's wages.

38. In *Re Merilus Technologies* (BC EST #D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
>
> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) the evidence must have high probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

39. None of the material included with the appeal meets the test for new evidence. All the documentation existed during the investigation of the Employee's complaint and ought to have been presented either during the investigation, or in response to the Report, if the Employer had been of the view that the Report was inaccurate.

40. Furthermore, I am not persuaded that, even had the material submitted on appeal been presented as it was during the investigation, it would not have led the Adjudicative delegate to a different conclusion. The main disagreement the Employer has with the Determination arises, as she appears to concede, on the method of calculating the Employee's wages as determined by the Adjudicative delegate.

Error of Law

41. Although the Employer did not identify this ground of appeal in her appeal submission, she does allege that the Employee's complaint was not filed within the statutory time period, or within the six months following the end of her employment.

42. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C. A.):

a) a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];

b) a misapplication of an applicable principle of general law;

c) acting without any evidence;

d) acting on a view of the facts which could not reasonably be entertained; and

e) adopting a method of assessment which is wrong in principle.

43. The record indicates that the Employee's complaint was submitted to the Director on September 16, 2020, which is within six months of her final day of work. Even though the Investigative delegate did not start investigating the complaint for nearly two years, I am satisfied the complaint was not statute barred. While I am sympathetic to the Employer's argument that she should not be required to pay interest charges on outstanding wages due to the Director's delay in deciding this matter, the interest is calculated on wages that were not properly paid to the Employee at the outset.

44. I also find that the Adjudicative delegate did not err in concluding that the Employer had made unauthorized deductions from the Employee's wages. The Employer appears to concede that the contravention arose as a result of calculation errors – she deducted backbar fees from the service before calculating the commission wage rather than calculating the commissions on the service then deducting the backbar fees. This is a factual finding which is amply supported by the record and does not rise to an error of law.

CONCLUSION

45. I find, pursuant to section 114(1)(f) of the *ESA*, that there is no reasonable prospect that the appeal will succeed.

ORDER

46. Pursuant to section 115 of the *ESA*, I confirm the Determination dated March 7, 2023 in the amount of $6,628.41 together with whatever interest may have accrued since the date of issuance, pursuant to section 88 of the *ESA*.

Carol L. Roberts
Member
Employment Standards Tribunal